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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JO-SAN ARNOLD, Plaintiff and Appellant, v. THE SENATE RULES COMMITTEE, Defendant and Respondent.	D051862 (Super. Ct. No. GIC840619)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Jo-San Arnold appeals from the judgment entered against her in the lawsuit for employment discrimination that she filed against the Senate Rules Committee of the California State Senate (the Senate).[1] Specifically, Arnold challenges (1) the trial court's ruling granting the Senate's motion for summary judgment; (2) the trial court's ruling

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1 According to evidence in the record, the Senate Rules Committee is a standing committee of the California State Senate, and not a separate public agency.

denying her motion for a new trial and motion for relief under Code of Civil Procedure section 473; (3) the trial court's ruling on her motion to tax costs; and (4) the trial court's ruling on an oral motion to disqualify Judge Joan Lewis from this case. As we will explain, we conclude that Arnold's arguments are without merit, and accordingly we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The History of Arnold's Employment at the Senate*

Arnold was employed by the Senate as a district representative for California State Senator William Morrow of the 38th Senatorial District from May 13, 1999, to January 30, 2004, when her employment was terminated. She was 56 years old at the time of her termination.

During her employment, Arnold was granted several extended leaves of absence. She was out of the office on paid leave for numerous days in the second half of 2002 to care for her ailing parents. In November 2002, Arnold returned to work but was in pain from a hernia, and she was also having difficulty concentrating on her work because of her mother's recent death. Arnold was granted a paid leave of absence starting in early December 2002 at the recommendation of her doctor, and she returned to work on January 7, 2003.

Arnold had emergency hernia surgery in February 2003, and was out of the office on unofficial leave for most days until mid-March 2003 when she returned to organize and attend a March 21, 2003 community event, among other things. It was then

determined that Arnold's hernia needed additional medical attention, and on March 23, 2003, through June 16, 2003, Arnold was given a fully paid medical leave, during which time she exhausted her 12 weeks of entitlement under the federal and state family medical leave laws; six of the weeks were paid through Arnold's accrued sick leave, and the other six weeks were paid by her employer. From June 17, 2003, to November 18, 2003, Arnold received a fully paid medical leave utilizing the Senate's catastrophic leave benefits, under which other employees donated their own sick leave to Arnold. From November 19, 2003, to January 30, 2004, Arnold received a fully paid administrative leave pending the investigation and outcome of the incident that led to her termination. Thus, Arnold did not report to the office after the beginning of her medical leave on March 23, 2003.

On March 21, 2003, right before her medical leave began, Arnold was confronted by an angry female coworker. Her supervisor, who witnessed the incident, refused to stop it. After Arnold complained about the incident, the Senate's director of personnel, Dina Hidalgo, conducted an investigation. Arnold's coworker and supervisor were both found to have acted inappropriately and were disciplined by receiving a single day of suspension without pay. Arnold did not receive any discipline or criticism as a result of the investigation.

B. *The Events Leading to Arnold's Termination*

The events that led to Arnold's termination arose in August 2003 while Arnold was on medical leave. Arnold's adult son, Ethan, who was disabled by a traumatic brain injury when he was 10 years old, requires 24-hour live-in care. Aaron Byzak, who

worked as a volunteer in Senator Morrow's office, was hired as a live-in caregiver for Ethan. The organization that employed Byzak was Independence for Life Choices (ILC).

In August 2003, Arnold wrote e-mails to Senator Morrow's chief of staff, Wade Teasdale, regarding Byzak. Arnold stated that ILC had fired Byzak "for cause" after "multiple incidents"; that Byzak was "lashing out" at everyone; that Byzak had threatened ILC's chief executive officer, Stephanie Richards; and that Byzak told Richards that he was "going 'to get'" Arnold.

Teasdale informed Senator Morrow about Arnold's statements regarding Byzak. Senator Morrow was considering hiring Byzak for a paid position, and he directed Teasdale to conduct an investigation. Teasdale enlisted Hidalgo to assist him. During the investigation, Hidalgo spoke with ILC's chief executive officer Richards. According to Hidalgo, Richards denied Byzak was terminated for cause, that she ever felt threatened by Byzak or that Byzak told her he was "going 'to get'" Arnold. Teasdale spoke with Byzak's supervisor at ILC, Debra Putten. According to Teasdale, Putten told her that Byzak was an exceptional employee and a fine worker, that the request to remove Byzak from Ethan's care was a family request, and that ILC would hire Byzak again immediately.

After meeting with Arnold and reviewing documents that Arnold claimed supported her version of events, Senator Morrow, Hidalgo and Teasdale concluded that Arnold had falsely represented information, and they decided to terminate Arnold's employment. The day after she met with Senator Morrow regarding the investigation,

Arnold sent him a letter stating that she would "honor whatever choice you make regarding my continued employment."

On December 1, 2003, Senator Morrow wrote a letter to Arnold explaining that based on the investigation conducted by Teasdale and Hidalgo, he had come to the conclusion that Arnold had made knowingly false reports about Byzak. Senator Morrow stated that he was recommending to the Senate that her employment be terminated because "the bond of trust has been broken," and his faith in her performance "has been diminished beyond repair." Although Arnold was notified of her termination in the December 1, 2003 letter, she was permitted to retain her paid position, without reporting to the office, until January 30, 2004.

On March 14, 2004, Arnold requested that the Secretary of the Senate, Gregory Schmidt, conduct a formal review and investigation of the decision and the facts surrounding her termination. On March 26, 2004, Schmidt wrote to Arnold, informing her that employees of the Senate Rules Committee are not entitled to any particular appeal proceedings relating to termination, but assuring her that the decision to terminate her employment was carefully reviewed and investigated by Hidalgo, with Schmidt's oversight, and that "a thorough evaluation indicated the course of action taken."

C. *Arnold Files a Charge with the Department of Fair Employment and Housing, Followed by this Lawsuit*

Arnold filed a charge with the Department of Fair Employment and Housing (DFEH) on November 30, 2004. She alleged that she was fired, harassed, denied accommodation and denied family or medical leave, and that these acts were taken

because of "sex, age, association, physical disability, mental disability, and making complaints." The DFEH issued a right to sue notice, and Arnold filed this lawsuit on December 30, 2004.

The operative complaint is the third amended complaint (the complaint). It alleges 13 causes of action: (1) invasion of privacy; (2) disability discrimination in violation of Government Code section 12940;[2] (3) disability harassment in violation of section 12940, subdivision (j)(1);[3] (4) disability discrimination in violation of section 12940, subdivision (k);[4] (5) disability discrimination in violation of section 12940,

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[2] All further statutory references are to the Government Code unless otherwise indicated.

Section 12940, subdivision (a) states in relevant part that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person . . . to discharge the person from employment . . . , or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

[3] Section 12940, subdivision (j)(1) states in relevant part that it is an unlawful employment practice "[f]or an employer . . . because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee . . . . Harassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees . . . where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

[4] Section 12940, subdivision (k) states in relevant part that it is an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

subdivision (m);[5] (6) disability discrimination in violation of section 12940, subdivision (n);[6] (7) age discrimination in violation of section 12940, subdivisions (a) and (j)(1); (8) age discrimination in violation of section 12940, subdivision (k); (9) sex-based discrimination and harassment in violation of section 12940, subdivisions (a) and (j)(1); (10) sex-based discrimination and harassment in violation of section 12940, subdivision (k); (11) retaliation in violation of section 12940, subdivision (h);[7] (12) wrongful termination in violation of public policy; and (13) violation of the California Family Rights Act (CFRA) (§ 12945.2).

D. *The Senate's Motion for Summary Judgment*

The Senate filed a motion for summary judgment. In support of its motion, the Senate relied primarily on declarations from Senator Morrow, Teasdale, Hidalgo and Schmidt, and documents authenticated by those declarations. Among other things, the

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[5] Section 12940, subdivision (m) states in relevant part that it is an unlawful employment practice "[f]or an employer . . . to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee."

[6] Section 12940, subdivision (n) states in relevant part that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition."

[7] Section 12940, subdivision (h) states in relevant part that it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

Senate argued (1) that it had established that Arnold was terminated because she had misrepresented facts about Byzak rather than because of discriminatory reasons; (2) that Arnold's requests for medical and family leave were repeatedly accommodated; (3) that Arnold had never complained about harassment based on disability, age or gender, and no such harassment occurred; (4) that Arnold's causes of action for invasion of privacy and wrongful termination failed because she had not complied with the California Tort Claims Act (§ 900 et seq.); (5) that Arnold's claims for harassment were barred by the statute of limitations; and (6) that the claims for invasion of privacy and wrongful termination failed as a matter of law.

In opposition to the motion for summary judgment Arnold submitted her own declaration and declarations from two individuals regarding the circumstances under which Byzak left his employment with ILC.[8] Arnold also filed a notice of lodgment which attached voluminous deposition transcripts and documents. However, Arnold did not submit any declarations to authenticate the documents. The Senate filed extensive evidentiary objections to Arnold's evidence.

The trial court granted the motion for summary judgment in a lengthy ruling that separately addressed each of the 13 causes of action.

The trial court also ruled on each of the Senate's 125 evidentiary objections, overruling only 13 of them. Specifically, the trial court sustained the Senate's objections

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8 The parties also make reference to Arnold's filing of a declaration from the paralegal who prepared and mailed Arnold's government tort claim, but that declaration is not part of the appellate record.

to (1) all of the deposition testimony and documentary evidence relied on by Arnold and (2) many of the statements made in the declarations submitted by Arnold. As a result, Arnold was left with very little admissible evidence to support her opposition to the motion for summary judgment. Indeed, all that remained of the evidence submitted by Arnold were some of the statements in the declarations filed along with her opposition.

E. *Arnold's Postjudgment Motions*

After the summary judgment motion was granted, Arnold brought a motion for relief under Code of Civil Procedure section 473 and a motion for a new trial. The trial court denied both motions.

At the hearing on the motion for a new trial, Arnold made an oral motion to disqualify Judge Lewis from the case. The trial court denied the motion on the ground that the challenge was required to be in writing.

Arnold also filed a motion to tax costs, in which she argued that the trial court should exercise discretion to disallow all of the costs claimed by the Senate or, due to her financial condition, should reduce the amount of costs awarded. The trial court rejected Arnold's arguments, but it did tax certain specific items. The trial court awarded the Senate $37,976.70 in costs.

On appeal Arnold challenges (1) the ruling on the motion for summary judgment; (2) the ruling on the motions for relief under Code of Civil Procedure section 473 and the motion for a new trial; (3) the ruling on the motion to tax costs; and (4) the ruling on her oral motion to disqualify Judge Lewis.

II

DISCUSSION

A. *The Motion for Summary Judgment*

We first address Arnold's challenge to the trial court's ruling granting the Senate's motion for summary judgment.

1. *Standard of Review*

We begin by setting forth the standards applicable to our review of a ruling granting a motion for summary judgment.

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*) "[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action[;] the defendant need not himself conclusively negate any such element." (*Id.* at p. 853, fn. omitted.) "A defendant moving for summary judgment may establish that an essential element of the plaintiff's cause of action is absent by reliance on the pleadings, competent declarations, binding judicial admissions contained in the allegations of the plaintiff's complaint, responses or failures to respond to discovery, and the testimony of witnesses

at noticed depositions." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1375.)

If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261 (*Silva*).) "'When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647.)

Ultimately, the moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850.)

We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

As we have explained, the trial court sustained many of the Senate's evidentiary objections to the evidence relied on by Arnold in her opposition to the summary judgment motion. "[F]or purposes of reviewing a motion for summary judgment, we do not consider evidence 'to which objections have been made and sustained.'" (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139 (*Alexander*).) If Arnold had challenged the trial court's evidentiary ruling in her appellate briefing, we would have applied an abuse of discretion standard of review to the trial court's rulings. (*Id*. at p. 140, fn. 3.) However, Arnold's appellate brief does not challenge the trial court's evidentiary rulings.[9] "Where a plaintiff does not challenge the superior court's ruling sustaining a moving defendant's objections to evidence offered in opposition to the summary judgment motion, 'any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been "properly excluded."'" (*Alexander*, *supra*, 104 Cal.App.4th at p. 140.)

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9 In the context of challenging the trial court's ruling denying her motion for relief under Code of Civil Procedure section 473 and her motion for a new trial, Arnold briefly argues in her opening brief that "[i]t was error for the court to decline to consider the documentary evidence proffered by [Arnold]." However, this argument — which is undeveloped and lacks any citation to the record or to legal authority — is not framed as a challenge to the trial court's evidentiary ruling in connection with the motion for summary judgment. Instead, it is a challenge to the trial court's ruling on the motion for relief under Code of Civil Procedure section 473 and the motion for a new trial, in which Arnold requested that the trial court reconsider the summary judgment motion and take into account the evidence that it had excluded.

2. *The Causes of Action Alleging Unlawful Termination Based on Age, Gender and Disability*

Several of Arnold's causes of action share a common allegation, namely, that Arnold was terminated because of her membership in a protected class rather than for the reasons claimed by the Senate. Specifically, in the second, seventh and ninth causes of action, Arnold alleges that she was wrongfully terminated based on disability, age and gender.

a. *Applicable Legal Standard*

The same general analytical approach is applicable to Arnold's claims that she was wrongfully terminated because of age, gender and disability. California courts follow the three-stage burden-shifting analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) for federal discrimination cases. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 & fn. 21 (*Guz*).)[10] "By applying *McDonnell Douglas*'s shifting burdens of production in the context of a motion for summary judgment, 'the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.'" (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806 (*Horn*).)

Under that burden-shifting analysis, "[f]irst, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the

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10 "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz*, *supra*, 24 Cal.4th at p. 354.)

plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [Citation.] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253 (*Burdine*), citing *McDonnell Douglas*, *supra*, 411 U.S. at pp. 802, 804.)

In conducting our de novo review of the trial court's summary judgment ruling, we apply *McDonnell Douglas*'s three-stage burden-shifting analysis together with the burden-shifting analysis applicable to a summary judgment motion. The Senate may meet its burden on summary judgment as to *McDonnell Douglas*'s first step by pointing to a lack of evidence in support of plaintiff's prima facie case, and the Senate will prevail if Arnold is unable to rebut that showing by establishing that there is a triable issue of material fact as to her prima facie case. (See *Guz*, *supra*, 24 Cal.4th 317, 374 (conc. opn. of Chin, J.; *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

The Senate may also decline to address whether Arnold is able to establish a prima facie case and may instead meet its burden on summary judgment by setting forth admissible evidence sufficient to support a finding in its favor that it had a legitimate nondiscriminatory basis for Arnold's termination. (*Guz*, *supra*, 24 Cal.4th at p. 357.) This showing will satisfy the second step of the *McDonnell Douglas* framework and also carry the Senate's initial burden on summary judgment. (*Ibid*.) In that case, the burden

shifts both under the summary judgment analysis and under the *McDonnell Douglas* framework, and our inquiry becomes whether Arnold has met her burden "to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred." (*Guz*, at p. 357.) The plaintiff may succeed in meeting her burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (*Burdine*, *supra*, 450 U.S. at p. 256.)

b. *The Senate Satisfied Its Burden by Establishing a Nondiscriminatory Basis for Arnold's Termination*

Here, the Senate elected to satisfy its initial burden on summary judgment by setting forth evidence showing a nondiscriminatory reason for the adverse employment action it took against Arnold. (*Guz*, *supra*, 24 Cal.4th at p. 357.) The Senate satisfied this burden by presenting evidence — in the form of declarations and documentary evidence — that Arnold was terminated because Teasdale, Hidalgo and Senator Morrow determined that she had provided false information about Byzak.

In an attempt to challenge the Senate's evidence establishing that she was terminated for nondiscriminatory reasons, Arnold cites Code of Civil Procedure section 437c, subdivision (e), which states that "summary judgment may be denied in the discretion of the court, where . . . a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." Arnold argues that the Senate's claim that she was terminated because of the

false statements about Byzak is based on Senator Morrow's statements in his declaration about his "state of mind," and thus summary judgment should have been denied under Code of Civil Procedure section 437c, subdivision (e).

We reject this argument for two reasons. First, the Senate did not rely solely on Senator Morrow's declaration to establish that Arnold was terminated for a nondiscriminatory reason. On the contrary, the Senate submitted declarations from several people involved in the process of investigating the relevant facts and deciding whether to terminate Arnold, and it also submitted extensive documentary evidence relating to the reasons for Arnold's termination, including the e-mails sent by Arnold about Byzak and notes from the investigation conducted by Teasdale and Hidalgo. Second, contrary to the implicit assumption in Arnold's argument, Code of Civil Procedure section 437c, subdivision (e) does not *require* that summary judgment be denied when a moving party attempts to establish a material fact by relying on a statement regarding a declarant's state of mind. Instead, the trial court has *discretion* to deny summary judgment on that basis. To the extent that Code of Civil Procedure section 437c, subdivision (e) applies to any of the statements in Senator Morrow's declaration, our application of that section on appeal is limited to reviewing whether the trial court abused its discretion. (*City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1288; 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 262, p. 709.) Arnold has identified no reason to conclude that the trial court abused its discretion in deciding to consider the statements in Senator Morrow's declaration explaining why he decided to terminate Arnold.

c. *Arnold Did Not Submit Admissible Evidence Creating a Disputed Issue of Material Fact as to Whether the Senate's Nondiscriminatory Reason for Her Termination Was a Pretext for Discrimination*

Because the Senate satisfied its burden to establish a nondiscriminatory basis for Arnold's termination, the burden shifted to Arnold to establish that the reason given by the Senate for her termination was a pretext for intentional discrimination. Arnold's discrimination claim cannot survive the motion for summary judgment "unless the evidence in the summary judgment record places [the Senate's] creditable and sufficient showing of innocent motive in material dispute by raising a triable issue, i.e., a permissible inference, that, in fact, [the Senate] acted for discriminatory purposes." (*Guz, supra,* 24 Cal.4th at p. 362.) "'[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Horn, supra,* 72 Cal.App.4th at pp. 806-807.)

Arnold presents a number of arguments in an attempt to show that the Senate's expressed reason for her termination was a pretext for actual discrimination based on gender, age or disability. However, as we will explain, many of these arguments are foreclosed because the trial court sustained the Senate's objections to the evidence on which Arnold relies, and Arnold does not challenge those evidentiary rulings on appeal. Further, Arnold's arguments lack merit for additional reasons.

First, Arnold relies on unidentified excerpts from Senator Morrow's deposition testimony to argue that Senator Morrow admitted to terminating Arnold because of her association with a disabled person, namely her son Ethan.[11] Arnold explains that Ethan has a problem with marijuana use as a result of being developmentally disabled. In her appellate brief, Arnold claims that Senator Morrow "testified that although not the principle [*sic*] reason, part of the reason for [Arnold's] termination was the fact that she associated with a developmentally-disabled individual, her son, who was dually diagnosed with traumatic brain injury and substance abuse — Senator Morrow said it was her son's marijuana use he found offensive."

Arnold has not provided any citations to the record to support her argument.[12] Accordingly, we do not consider it. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 (*City of Lincoln*) [arguments not supported by adequate citations to record need not be considered on appeal].) In reviewing a ruling on a motion or summary judgment, "de novo review does not obligate us to cull the record for the benefit of the

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[11] Arnold is apparently relying on section 12926, subdivision (m), which states, "'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics *or that the person is associated with* a person who has, or is perceived to have, any of those characteristics." (Italics added.)

[12] Arnold provides no citation to the record in the argument portion of her appellate brief on the issue of Senator Morrow's deposition testimony. In the portion of Arnold's opening appellate brief that provides a summary of the facts of her case, she does provide a record citation after stating that Senator Morrow allegedly terminated Arnold because of Ethan's marijuana use. However, the citation provided is to a 14-page range in the

appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Not only is Arnold's argument unsupported by a citation to the record, it also fails because even had Arnold provided any record citations to Senator Morrow's deposition testimony, we would not consider that evidence because the trial court sustained the Senate's objections to all of the deposition testimony submitted by Arnold, including the deposition testimony of Senator Morrow.

Second, Arnold argues that circumstantial evidence establishes she was actually terminated because she requested an accommodation for her medical condition shortly before her termination. Although Arnold provides no citation to the record regarding her request for accommodation, she is apparently referring to an e-mail she sent on November 14, 2003, in which she stated that because of some continuing medical issues related to her hernia surgery, "Maybe, with the Senator's and [Teasdale's] concurrence, I could come in a little later and leave a little earlier to meet the doctor's recommendations . . . ."[13] Arnold argues that circumstantial evidence proves that her

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separate statement of undisputed material facts which covers numerous subjects. No citation to the deposition testimony as it appears in the appellate record is provided.

13 We may properly consider this e-mail because it was submitted by the Senate in support of its motion for summary judgment, and was not the subject of any evidentiary objections.

request for accommodation was the real reason for her termination because a coworker, Molly Nichelson, purportedly "suffered from a disability, requested accommodation and was fired." Arnold provides no citation to the record for this assertion, and we accordingly do not consider it. (*City of Lincoln*, *supra*, 102 Cal.App.4th at p. 1239.)

As additional circumstantial evidence that she was actually terminated because of her request for an accommodation, Arnold argues that "[o]nly after [she] notified Senator Morrow that she was coming back and needed accommodation [i.e., on November 14, 2003] did her comments about Byzak become an issue." The evidence in the record provides no support for Arnold's contention. On the contrary, the Senate submitted evidence that Teasdale became concerned about Arnold's statements regarding Byzak in September 2003, and that by September 10, 2003, he had spoken to Byzak's supervisor Putten, which caused Teasdale to believe that Arnold may have deliberately lied. These events occurred long before Arnold asked for an accommodation on November 14, 2003.

Third, Arnold argues that the Senate's nondiscriminatory reason for terminating her employment is pretextual because the Senate did not conduct an adequate investigation into her statements about Byzak. In support of her argument, Arnold relies on *Silva*, *supra*, 65 Cal.App.4th 256, 262, which she claims sets forth the "standards of an adequate workplace investigation." *Silva* is not applicable here. *Silva* discussed the scope of an adequate investigation when an employee who is working under *an implied employment contract* is terminated for misconduct. (*Id*. at pp. 261-262.) In that case, the employer must "'act[] in good faith and follow[] an investigation that [is] appropriate under the circumstances.'" (*Id*. at p. 263.) In contrast, to defeat a claim for employment

discrimination on summary judgment, an employer need only establish that it had *a nondiscriminatory reason* for its termination of the plaintiff; the employer's reason for termination "need not necessarily have been wise or correct." (*Guz, supra*, 24 Cal.4th at p. 358.) To defeat summary judgment, "the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.'"'" (*Horn, supra*, 72 Cal.App.4th at p. 807.) The issue is not whether the employer's decision to terminate the plaintiff was "reasonable and well considered," but rather whether the employer's stated reasons "were implausible, or inconsistent or baseless." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009.)

Applying that legal standard, Arnold's focus on the manner in which the Senate conducted its investigation does not serve to create a triable issue of fact sufficient to defeat summary judgment. According to the undisputed evidence in the record: (1) Teasdale and Hidalgo conducted an investigation into Arnold's statements about Byzak; (2) during the investigation they spoke with Richard and Putten from ILC, both of whom gave them information that contradicted Arnold's statements; and (3) Senator Morrow and Hidalgo gave Arnold a chance to explain her position, and considered written evidence she presented, but she was not able to establish that she had in fact been

truthful about Byzak.[14] This evidence provides support for the Senate's contention that it terminated Arnold for nondiscriminatory reasons, and provides no support for a finding that the Senate's stated reason for Arnold's termination was implausible, inconsistent or baseless.

Finally, Arnold argues that a jury could infer that she was in fact terminated based on her medical disability because Senator Morrow's letter explaining his reasons for terminating Arnold alludes to her "personal problems" with her coworkers.[15] Arnold argues that her personal problems with her coworkers arose because her coworkers were upset that she had received time off for medical problems, and that Senator Morrow was "trying to placate" the upset staff members by terminating Arnold.

We reject this argument for two reasons. First, Arnold cites to no admissible evidence in the record to support her claim that her problems with her coworkers related

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[14] Arnold argues that the investigation was not properly conducted for several reasons, including "there were no investigatory procedures set forth in writing"; "Hidalgo did not get any written statements from the witnesses she interviewed and their deposition testimony contradicts her version of the interviews"; "Hidalgo did not attempt to illicit *facts* from Richards, she sought out opinions about Byzak — was Richards 'afraid' of him, etc."; and ". . . Hidalgo never prepared a summary report on this investigation." None of Arnold's factual assertions are supported by a citation to the record. Accordingly, we do not consider them. (*City of Lincoln*, *supra*, 102 Cal.App.4th at p. 1239.)

[15] Senator Morrow's letter recounts that when he met with Arnold as part of the investigation into her statements about Byzak, he shared with her his "concerns regarding past personal conduct with your coworkers which has been difficult to manage." Senator Morrow stated, "I know that some of these issues involved mutual misunderstandings and mutual responsibility. Were it not for this recent incident, I had intended to try to resolve these issues with warnings and efforts aimed at conciliation. However, following this incident, my faith in your performance has been diminished beyond repair."

to the fact that she received a medical leave of absence. Second, Senator Morrow's letter did not state, as Arnold claims, that she was terminated in part because of her problems with her coworkers. On the contrary, Senator Morrow's letter clarified that the Byzak incident was the impetus for Arnold's termination.

Having determined that Arnold is not able to create a triable issue of material fact as to whether the Senate's proffered legitimate ground for her termination was a pretext for discriminatory motives, we conclude that the trial court properly granted summary judgment on the second, seventh and ninth causes of action to the extent those causes of action are based on the fact of Arnold's termination.

3. *Allegations of Other Adverse Employment Actions Based on Gender, Age and Disability*

In addition to relying on the allegation that she was *terminated* for allegedly unlawful reasons, Arnold bases her second, seventh and ninth causes of action on the claim that she suffered *other* adverse employment actions for discriminatory reasons in violation of section 12940, subdivision (a). That provision "protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053-1054 (*Yanowitz*).)

The Senate satisfied its initial burden on summary judgment as to Arnold's allegations that she suffered other adverse employment actions by showing that Arnold

could not establish a prima facie case. To establish a prima facie case for employment discrimination, the plaintiff generally "must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz*, *supra*, 24 Cal.4th at p. 355.) The Senate showed that Arnold could not establish that she suffered an adverse employment action (other than termination, which we have already discussed) based on her age, gender or disability by relying on declarations from Hidalgo, Teasdale and Senator Morrow stating that they were not aware of any discrimination against Arnold during her employment and that Arnold never complained about any discrimination on the basis of disability, age or gender during her employment. The burden thus shifted to Arnold to show that she did suffer discrimination that led to an adverse employment action.

Throughout her briefing, Arnold mentions several alleged adverse employment actions. First, Arnold states that she suffered a "de facto demotion" after she returned to work in November 2002 after a medical leave of absence and was given "a traditionally female administrative position." Second, Arnold vaguely argues that a male coworker "in his mid-thirties . . . was given preferential treatment," and that "the female staff were allowed to cherry-pick invitations for him." Third, Arnold states that she was "hired as a District Representative but was assigned office duties." Fourth, she alleges that she was

"denied the same networking opportunities as the male employees, including attending sporting events, camping, hunting and attending functions."[16]

Arnold's arguments fail because they are not supported by any admissible evidence in the record. For some of the arguments, Arnold provides no citation to the record. For the remainder of the arguments, Arnold provides a citation to the separate statement of undisputed material facts, but all of the relevant evidence cited in that document was excluded by the trial court. Because Arnold cannot point to evidence suggesting that any adverse employment action occurred based on her age, gender or disability, she cannot establish a prima facie case of discrimination.

Accordingly, the trial court properly granted summary judgment on the second, seventh and ninth causes of action to the extent those causes of action alleged that Arnold suffered adverse employment actions, other than termination, based on her age, gender or disability.

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16 In her briefing Arnold also mentions other minor incidents, such as a coworker allegedly calling her "'old'" and the fact that she was excluded from her younger coworkers' social gatherings. These incidents do not support a cause of action for discrimination under section 12940, subdivision (a) because "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1054-1055.)

4. *The Causes of Action Alleging Failure to Accommodate a Disability and Failure to Engage in an Interactive Process*

The fifth cause of action alleges that the Senate violated section 12940, subdivision (m) because it failed to make reasonable accommodations for Arnold's disability. The sixth cause of action alleges that the Senate violated section 12940, subdivision (n) because it failed to engage in an interactive process with Arnold to determine what reasonable accommodations could address her disability.

The disability that Arnold alleged was not accommodated by the Senate is her hernia condition. As defined by statute, "'[r]easonable accommodation'" may include either of the following: [¶] (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. [¶] (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." (§ 12926, subd. (n).) Further, "a finite leave can be a reasonable accommodation . . . , provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.) "Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.)

The Senate moved for summary judgment, arguing that the undisputed evidence showed that it reasonably accommodated Arnold's medical disability by granting her a lengthy leave of absence. It also relied on statements by Teasdale and Hidalgo that at no time during her employment did Arnold request a reasonable accommodation for a disability in writing, and that Arnold also did not make any verbal requests for accommodations, other than for leave, which was granted.

Arnold argues that the Senate failed to accommodate her disability on three occasions, and that summary judgment was improperly granted because she can prove her claims under section 12940, subdivisions (m) and (n), based on those incidents.

First, Arnold argues that the Senate failed to accommodate her disability "after she returned to work in November 2002 by requiring her to cover the office even though she told [her supervisor] she was in pain and could not sit without pain." Arnold's argument is not accompanied by a citation to the record in support, and we accordingly do not consider it. (*City of Lincoln*, *supra*, 102 Cal.App.4th at p. 1239.) Moreover, as the Senate points out, the undisputed evidence in the record is that it *did* accommodate the medical problems that Arnold experienced upon her return to work in November 2002, because it permitted her to take a paid leave of absence starting in early December 2002 through January 7, 2003.

Second, Arnold argues that the Senate failed to accommodate "her request for no heavy lifting" when it required her "to lift heavy trays of food" at a community event on March 23, 2003, shortly before she went out on her medical leave. Again, Arnold provides no citation to the record, and we thus do not consider her argument. (*City of*

Lincoln, supra, 102 Cal.App.4th at p. 1239.) Further, although Arnold does not supply citations to the record to support her argument, we have located the portion of Arnold's declaration that discusses the tray-lifting incident, and we note that the trial court sustained the Senate's objection to that portion of the declaration. In addition, as the Senate points out, shortly after the March 23, 2003 incident, it fully accommodated Arnold's disability by placing her on paid medical leave.

Finally, Arnold claims that in November 2003, when she was preparing to return to work from her leave, the Senate failed to address her request for accommodation. Although Arnold again does not provide a record citation, we assume that she is referring to the e-mail that we have already discussed above, in which Arnold mentioned that upon her return to work she would like to be able to come in a little late and leave a little early because of medical issues. This argument fails because Arnold never in fact returned from her leave. She was terminated before she returned to work, and thus there is no factual basis for her statement that the Senate failed to reasonably accommodate her upon her return to work.

Based on the above analysis, we conclude that the trial court did not err in granting summary judgment on the fifth and sixth causes of action.

5. *Causes of Action Alleging Harassment Based on Age, Gender and Disability*

In the third, seventh and ninth causes of action Arnold alleges that she suffered harassment based on her age, gender and disability in violation of section 12940, subdivision (j)(1).

To prevail in her claims for harassment, Arnold would have to prove that she suffered "abusive conduct . . . sufficiently severe *or* pervasive so as to alter the conditions of her employment thus creating an abusive working environment." (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 161; see also *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130.)

Without providing any citation to the record, Arnold provides a list of incidents that she claims amounted to harassment based on her gender, age or disability. She states "[t]his included being chastised for taking time off for her hernia, being called at home and told she needed to put off hernia surgery because she had too much work; being assaulted [by a coworker] at the [community event in March 2003] due to her disability and refusal to perform administrative work; being verbally harassed by [a woman coworker] who called her 'old,' conspired to hide invitations from her, screamed at her in the workplace, told her she was doing a bad job, called her a 'Mexican-lover' and a 'fucking bitch'; [a male coworker] and the female office staff harassed her by hoarding all the invitations and giving her only the undesirable traditionally women related ones; [and] being threatened by Byzak."

The Senate argues that with respect to all of these allegations, Arnold's harassment claims are barred because she did not file her complaint with the DFEH alleging harassment within one year from the time that the harassment occurred.

To address a violation of section 12940, a plaintiff must file a verified complaint with the DFEH, and with certain exceptions not applicable here, "[n]o complaint may be filed after the expiration of one year from the date upon which the alleged unlawful

practice or refusal to cooperate occurred . . . ." (§ 12960, subd. (d).) "The *timely* filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages . . . ." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492, italics added.) Here, Arnold filed her complaint with the DFEH on November 30, 2004. Thus, Arnold is barred from pursuing recovery for acts of harassment that occurred more than one year before November 30, 2004.

The undisputed evidence is that Arnold did not report to work after March 23, 2003, and she performed no work after she was notified of her termination in Senator Morrow's December 1, 2003 letter. According to Arnold's e-mail to Teasdale, Byzak's alleged threatening behavior occurred no later than August 2003. Thus, all of the alleged incidents of harassment identified by Arnold occurred more than one year before November 30, 2004. We therefore conclude that summary judgment was properly granted on the third, seventh and ninth causes of action because they are barred by Arnold's failure to timely file a complaint with the DFEH.[17]

6. *The Cause of Action Alleging Unlawful Retaliation*

The 11th cause of action alleges that the Senate retaliated against Arnold in violation of section 12940, subdivision (h) on the basis that she made complaints that she

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17 Arnold argues that her harassment claims are not time-barred because the continuing violation doctrine applies. Under that doctrine, harassment that occurs *outside* the limitations period is actionable if it is part of an ongoing course of conduct that also occurs *inside* the limitations period. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812, 823.) Here, because none of the harassment that Arnold identifies occurred inside the limitations period, the continuing violation theory does not apply.

was discriminated against and suffered harassment on the basis of her age, gender or disability.

The validity of Arnold's claim for retaliation in violation of section 12940, subdivision (h) is evaluated by using the same burden-shifting analysis that we set forth above concerning Arnold's claim for discrimination based on gender, age and disability. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) Thus, Arnold must initially "establish a prima facie case of retaliation." (*Ibid*.) "To establish a prima facie case of retaliation, '. . . the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action.'" (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814.)

The Senate argues that Arnold cannot establish a prima facie case that it retaliated against her for making a complaint about discrimination or harassment, because there is no evidence that she ever engaged in the protected activity of making a complaint.

To satisfy its initial burden on summary judgment, the Senate submitted declarations (1) from Senator Morrow and Hidalgo stating that Arnold never complained about harassment or discrimination based on her age, gender or disability, and (2) from counsel stating that in none of the over 2,000 documents she produced in discovery did Arnold express concerns of discrimination or harassment.

Without providing any citation to the record, Arnold states in her appellate brief that "she complained to her supervisors . . . many times." Because Arnold has not provided a citation to admissible evidence in the record to establish that she ever made a

complaint about discrimination or harassment based on gender, age or disability during her employment, she cannot establish a prima facie case that the Senate retaliated against her in violation of section 12940, subdivision (h). Accordingly, we conclude that the trial court properly granted summary judgment in favor of the Senate on the 11th cause of action.

7. *The Causes of Action for Failure to Prevent Unlawful Discrimination or Harassment*

The fourth, eighth and 10th causes of action allege that the Senate violated section 12940, subdivision (k), which makes it an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

An essential foundational requirement for a successful claim under section 12940, subdivision (k) is the occurrence of unlawful discrimination or harassment. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.) Because we have concluded that Arnold's causes of action for unlawful discrimination and harassment lack merit, we conclude that Arnold's causes of action for failing to prevent harassment and discrimination similarly fail.

8. *The Cause of Action for Wrongful Termination in Violation of Public Policy*

The 12th cause of action alleges that the Senate wrongfully terminated Arnold in violation of public policy.

Wrongful termination in violation of public policy exists when a plaintiff is terminated "in violation of a fundamental public policy expressed in a statute or a

constitutional provision." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 130.) In the complaint, Arnold alleges that the Senate wrongfully terminated her in violation of laws prohibiting discrimination and harassment on the basis of gender, age and disability.

As discussed above, there is no merit to Arnold's claims that she suffered discrimination and harassment based on gender, age or disability. Accordingly, we conclude that Arnold's cause of action for wrongful termination in violation of public policy also fails.[18]

9. *The Cause of Action for Denial of Family Care and Medical Leave*

In the 13th cause of action, Arnold alleges that the Senate violated the CFRA (§ 12945.2) by denying requests for medical leave.

The CFRA requires that in any 12-month period, a covered employer must allow a qualifying employee to take up to a total of 12 workweeks of unpaid leave for family care or medical reasons. (§ 12945.2, subds. (a), (d).)

The Senate moved for summary judgment on this cause of action by relying on evidence that Arnold was granted every leave that she requested, including medical leave

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18 In her appellate brief, Arnold claims another basis for her claim that she was wrongfully terminated in violation of public policy. She contends that "she was terminated for complaining about campaign and ethical violations." We reject this argument for two reasons. First, this allegation does not appear in the complaint, and the scope of the issues that a plaintiff may raise in opposition to a summary adjudication motion are bound by allegations of the complaint. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663-1664.) Second, Arnold cites to no admissible evidence in the record to support her contention that she complained about campaign and ethical violations, or that she was terminated for that reason. The trial court sustained the Senate's objection to the single paragraph discussing that topic in Arnold's declaration.

and time off when her parents became ill. As Hidalgo's declaration established, with respect to the need for medical leave because of her hernia condition, Arnold was offered and exhausted all of the 12 weeks of leave required by the CFRA in March through June 2003. In addition, the Senate established that Arnold was granted more than 15 months of leave between April 2001 and December 2003, and that although the CFRA requires only *unpaid* leave, all of Arnold's leave was *paid*.

Arnold's only argument in response is that she should have been permitted to take a CFRA leave from December 2002 through March 2003, instead of starting her CFRA leave on March 23, 2003.[19] In her appellate brief, Arnold contends that she "presented a doctor's certification for a medical leave of absence on December — [*sic*] 2002." She argues that the doctor's certification should have been treated as a request for leave under the CFRA. However, Arnold's argument fails for lack of factual support. She provides no citation to the record regarding the doctor's certification, and thus has not identified evidence to create a triable issue of material fact as to whether her communications with

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19 The undisputed evidence shows that as a means of accommodating Arnold's medical disability, she was given what she refers to as an "'unofficial'" paid leave from December 2002 to January 7, 2003, and also on several days in late February and early March 2003. However, as Arnold explains, she is unsatisfied with that unofficial leave because she was allegedly required to perform a limited amount of work at home during it. Further, as the Senate correctly argues, to the extent that Arnold is basing her claim on the fact that she was required to perform work at home during the unofficial leave in late 2002 and early 2003, that claim is time-barred because she did not file a claim with the DFEH within a year of the alleged violation.

the Senate in December 2002 were sufficient to constitute a request for leave under the CFRA, and whether the Senate unlawfully refused the request.[20]

We accordingly conclude that Arnold has not established a triable issue of material fact as to the whether the Senate complied with the CFRA, and summary judgment was properly entered on the 13th cause of action.

10. *The Cause of Action for Invasion of Privacy*

In the first cause of action, Arnold alleges that the Senate is liable for invasion of privacy. Specifically, Arnold alleges that the Senate disclosed private information about her and her son, Ethan, to her coworkers. The complaint alleges that the invasion of privacy consisted of "[t]he disclosures of (a) the fact of [Arnold's] taking a leave of absence[,] (b) the fact of her son's illness and its severity, (c) the fact of her termination, and (d) management[']s reasoning behind her termination . . . ."

In support of its motion for summary judgment the Senate relied on statements in the declarations of Teasdale, Hidalgo and Senator Morrow that they did not make disclosures of private information about Arnold to anyone who did not have a business-related need to know. The Senate further argued that to the extent her son's privacy was invaded, Arnold lacked standing to bring that claim.

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20 Indeed, the Senate's correspondence with Arnold indicates that from the Senate's perspective, Arnold had not submitted all of the medical paperwork necessary to obtain final approval of leave under the CFRA until approximately April 11, 2003. Arnold cites no admissible evidence to the contrary.

Arnold is apparently alleging the type of invasion of privacy concerning public disclosure of private facts. (See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.) The elements of this tort are "'(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.'" (*Ibid*.)

Arnold's claim for invasion of privacy fails because she points to no admissible evidence in the record to establish that the Senate publically disclosed any private information about her. Her argument simply lacks any citation to evidence. Further, as the Senate points out, to the extent that the invasion of privacy cause of action is based on publication of private information about Arnold's son, Arnold does not have standing to bring that claim. (See *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 821 ["'It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded'"].)

The trial court thus properly granted summary judgment on the cause of action for invasion of privacy, and, as we have discussed above, on each of Arnold's other causes of action.

B. *The Motion for a New Trial and Relief Under Code of Civil Procedure Section 473*

Arnold argues that the trial court erred in denying her motion for new trial and motion for relief under Code of Civil Procedure section 473.

Arnold devotes only slightly over a page of her opening appellate brief to this topic, and that discussion does not include a single citation to authority. Arnold's

discussion also contains no coherent legal argument. Instead, it mainly explains what Arnold was purportedly trying to achieve by filing her motions, namely, to convince the trial court to consider the evidence it had excluded. The discussion ends with a single unsupported argumentative sentence: "It was error for the court to decline to consider the documentary evidence proffered by [Arnold]." Arnold provides no further elaboration or support for that single sentence. The topic is not addressed at all in Arnold's reply brief.

Because Arnold's argument that the trial court erred in denying the motion for a new trial and the motion for relief under Code of Civil Procedure section 473 is not coherent and is not supported by any authority, we treat the argument as "abandoned and unworthy of discussion." (*Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689 ["Generally, asserted grounds for appeal that are unsupported by any citation to authority and that merely complain of error without presenting a coherent legal argument are deemed abandoned and unworthy of discussion"].) "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

C. *The Motion to Tax Costs*

We next address Arnold's challenge to trial court's ruling on the motion to tax costs.

In her motion to tax costs, Arnold argued that because her lawsuit asserted claims for employment discrimination under the California Fair Employment and Housing Act (FEHA) (§ 12900 et seq.), the trial court had discretion pursuant to section 12965, subdivision (b) to either (1) disallow all of the costs claimed by the Senate on the ground

that Arnold's lawsuit was not frivolous, unreasonable or groundless, or (2) to consider Arnold's financial condition in ruling on the amount of costs that the Senate should recover. The trial court rejected Arnold's argument. On appeal, Arnold advances only one of the arguments she made in the trial court, namely, that the trial court should have considered her financial condition when deciding the amount of costs that the Senate should recover.

We evaluate Arnold's argument by focusing on the applicable statutory provisions. Under Code of Civil Procedure section 1032, subdivision (b), "[e]xcept as otherwise provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Code of Civil Procedure section 1033.5 identifies categories of items that are allowable as costs, with the limitation that the costs must be "reasonably necessary to the conduct of the litigation" and "reasonable in amount." (Code Civ. Proc., § 1033.5, subd. (c)(2) & (3).)

Arnold argues that section 12965, subdivision (b) provides a statutory exception to Code of Civil Procedure section 1032, subdivision (b), because it states that in a civil action brought under the FEHA, "the court, *in its discretion*, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees." (§ 12965, subd. (b), italics added.) Seizing on the discretion given to the trial court under section 12965, subdivision (b), Arnold argues that the trial court could have exercised its discretion to reduce the cost award to an amount that was more financially manageable.

Arnold's argument is foreclosed by *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 442, in which our Supreme Court held that "the trial court's discretion in a FEHA

action is limited to determining whether any allowable costs were 'reasonably necessary' and 'reasonable in amount' (Code Civ. Proc., § 1033.5, subd. (c)(2) & (3)), and to awarding or denying additional items of costs that are not mentioned as either allowable or nonallowable in Code of Civil Procedure section 1033.5." (*Ibid*.) Our Supreme Court "reject[ed] any suggestion that Government Code section 12965, in referring to the trial court's 'discretion' to award attorney fees and costs, intended to provide the prevailing party in a discrimination action with *fewer* remedies than those afforded 'as of right' to other litigants pursuant to Code of Civil Procedure sections 1032 and 1033.5." (*Id*. at p. 444, fn. 3.)

Under Code of Civil Procedure sections 1032 and 1033.5 a trial court may not, when deciding whether a party's costs were reasonably necessary and reasonable in amount, consider the fact that the losing party has limited financial resources to pay the cost award. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129.) Accordingly, because the same standards apply in determining the costs to be awarded in a FEHA case as in any case applying Code of Civil Procedure sections 1032 and 1033.5, the trial court properly rejected Arnold's argument that it should take her financial situation into account when determining the amount of costs to be awarded to the Senate.

D. *The Oral Motion to Disqualify Judge Lewis*

The last issue we address is whether the trial court erred in denying the oral motion to disqualify the trial court judge that Arnold raised at the hearing on the motion for a new trial and motion for relief under Code of Civil Procedure section 473.

As counsel for Arnold explained at the hearing, the motion was premised primarily on the fact that Judge Lewis, Judge Lewis's husband and Senator Morrow had purportedly worked for the same law firm. The trial court denied the motion on the ground that a motion to disqualify a judge under Code of Civil Procedure 170.3 must be in writing.

We conclude that the trial court properly denied the disqualification motion on procedural grounds. Code of Civil Procedure section 170.3, subdivision (c)(1) plainly requires that a party file "a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge." Here, because Arnold made an oral motion that was not supported by a written verified statement, the motion was procedurally inadequate and was properly rejected by the trial court.[21]

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21 Further, we note that Arnold has not followed the correct procedure for challenging a ruling on a motion for disqualification. "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. . . ." (Code Civ. Proc., § 170.3, subd. (d).)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.